No. 77.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

MOOG INDUSTRIES, INC.,
Petitioner,

vs.

FEDERAL TRADE COMMISSION.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONER'S MOTION FOR REHEARING.

Petitioner Moog Industries, Inc., herein files its motion to set aside its per curiam opinion filed January 27, 1958, and reported in 78 S. Ct. 377 (Advance Sheet), insofar as per curiam opinion applies to its case No. 77, and for grounds thereof respectfully states:

1. The Court has failed to mention and to rule on the main question in the case and on which it granted certiorari: whether the Court of Appeals has original equitable jurisdiction to protect the rights of petitioner.

2. In failing to mention or to rule on the aforesaid question, the Court has failed to follow its previous rulings in **Old Colony Trust Co. v. Commissioner of Internal Revenue**, 279 U. S. 716, 722, 723, 49 S. Ct. 499, as well as in **Osborne v. U. S. Bank**, 9 Wheat. 738, page 819, 6 L. Ed. 204, and **McConihay v. Wright**, 121 U. S. 201, 7 S. Ct. 940, 942, 30 L. Ed. 392.

3. The aforesaid question presented and on which certiorari was granted has not been settled or decided by the per curiam opinion and is in the same status as it was before certiorari was granted.

ARGUMENT.

This Court granted certiorari on March 25, 1957, 353 U. S. 908, 77 S. C. 665, 1 L. Ed. 662, on the following question, which we reprint below for the convenience of the Court:

> "The petition for writ of certiorari is granted limited to question 4 presented by the petition for the writ which reads as follows:
>
> "'4. Another question presented is that of the denial by the Court of Appeals of petitioner's Motion to Hold Its Judgment and Order in Abeyance or to **exercise** its equitable powers and **original jurisdiction**, until its various numerous competitors who are using similar forms of volume discounts, which are standard in the industry, can be subjected to similar judgments and orders, since only two of its many competitors have been proceeded against similarly by the Federal Trade Commission; whether such denial by the Court of Appeals is inequitable, unjust and unfair when petitioner is subjected to the judgment and decree of the Court while its numerous competitors may still continue to offer volume discounts inevitably causing petitioner to suffer loss of business and subsequent financial loss; **and whether under such circumstances the Court should exercise its original equitable jurisdiction to protect the rights of petitioner.**' (Emphasis ours.)
>
> "The case is transferred to the summary calendar."

The per curiam opinion insofar as it affects the case No. 77 (Moog Industries, Inc.), paragraph 2, incorrectly states the question presented, the last words of said paragraph being:

> "* * * that petitioner would suffer financial loss if prohibited from engaging in pricing practices open to its competitors."

The particular words that seem to be incorrect are the words

> "engaging in pricing practices open to its competitors."

The record shows, as noted in our original brief, by documentary evidence as well as oral evidence, that seventeen competitors of your petitioner are actually engaged in pricing practices from which petitioner is prohibited from using. There is a vast difference between pricing practices open to competitors and pricing practices actually being used by competitors. The record shows that such pricing practices of volume discounts was standard practice in the industry, and in its brief the Federal Trade Commission does not deny this fact. Therefore, the statement of the question presented appears to be incorrect.

The opinion deals solely with the rights of the Commission to decide the question which is not the question that was presented to this Court, and on which it granted certiorari. It is self-evident that in the writing of this opinion the Court has inadvertently overlooked the question on which it granted certiorari and on which this case was briefed. In fact, members of the Court will recall that the numerous questions asked counsel in argument of this case were all directed at the powers of the Federal Trade Commission, and counsel did not have sufficient time in the half hour allowed to even present the question of the original jurisdiction of the Appeals Court on the matter.

The question of original jurisdiction of the Court of Appeals is still in the same status as before the Court granted certiorari. We respectfully submit that certainly this was not the intention of the Court when it wrote its per curiam

opinion. And your counsel respectfully submits that the issue presented requires the settling of this fundamental constitutional question of the jurisdiction as set forth in counsel's brief filed in the cause.

By failing to mention or to rule on the aforesaid question the Court has failed to follow its previous rulings in **Old Colony Trust Co. v. Commissioner of Internal Revenue**, 279 U. S. 716, 722, 723, 49 S. Ct. 499, as well as in **Osborne v. U. S. Bank**, 9 Wheat. 738, page 819, 6 L. Ed. 204, and **McConihay v. Wright**, 121 U. S. 201, 7 S. C. 940, 942, 30 L. Ed. 392. In addition this Court seems to have disregarded Article III, Section 2, of the Constitution of the United States as to the judicial power in United States Courts, all of which was set forth in our brief. (See pages 12 and 13.) In the Old Colony Trust Co. case, pages 722 and 723, this Court has flatly declared that proceedings from administrative tribunal on review before the Court of Appeals were judicial and that it was not important whether such a proceeding was originally begun by an administrative or executive determination if, when it came to the Court, it called for the exercise of judicial power of the Court upon which jurisdiction was conferred In addition this Court flatly held that the jurisdiction in the cause before the Court was exactly like that of review of orders of the Federal Trade Commission and cited in support several cases. (See page 13 of our original brief.)

We respectfully submit that former opinions of this Court holding in such respect should not be entirely disregarded as was done by the per curiam opinion.

In addition, we respectfully submit that members of the Bar who participate in litigation before the Federal Trade Commission and the Courts of Appeal involving questions similar to the one presented, should be given the benefit of a decision by this Court on this fundamental constitutional question.

For the reasons assigned, it is respectfully submitted that the per curiam be set aside and that this case may be set for reargument on the single question of the fundamental constitutional questions presented when certiorari was granted and as briefed by counsel in this case.

Respectfully submitted,

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I hereby certify that this motion for rehearing is presented and filed in good faith for the reasons assigned therein and is not made for purposes of delay.

Malcolm I. Frank,
One of Counsel for Petitioner.